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IN THE

Supreme Court of the United States

October Term, 1965

No. 514

EUGENE ALLEN DEUTSCH,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of the State of New York, First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Division of the Supreme Court, First Judicial Department, to review an order of that court which dismissed petitioner's application for a writ of *coram nobis*, thereby modifying, on the law, an earlier order of the Supreme Court,

New York County, which had denied the same petition on the merits. The *coram nobis* petition in issue sought to vacate petitioner's plea of guilty, and sentence thereon, to the crimes of FORGERY IN THE SECOND DEGREE (New York Penal Law §887) and GRAND LARCENY IN THE FIRST DEGREE (New York Penal Law §§1290, 1295). The sentence on each charge was a concurrent term of not less than three years nor more than six years in State Prison. Currently on parole in New Jersey, the petitioner has not yet served his New York sentence.

Questions Presented

1. Whether petitioner's *coram nobis* application may be considered on the merits.

2. Whether the *nisi prius* court had jurisdiction to impose sentence.

Statement of the Case

On July 9, 1959, a twenty-eight count indictment was filed by a New York County Grand Jury charging the petitioner with uttering forged documents and stealing over half a million dollars from Walter B. Heller & Company (Ind. #2620/59).

Petitioner pleaded guilty to one count of first degree grand larceny and one count of second degree forgery on December 21, 1961; he was sentenced on July 10, 1962, to concurrent terms of from three to six years after the court learned that the theft of over one million dollars was never

recovered (mins. of plea, pp. 2-3; mins. of sent., pp. 9, 13-14).

At the same time that these proceedings were taking place in this state, the petitioner was also being prosecuted in New Jersey for related criminal activity. After pleading no contest and then subsequently obtaining appellate court assistance in withdrawing that plea after the trial court refused to permit it [34 N. J. 190, 168 A. 2d 12], petitioner was found guilty after a jury trial in the County Court of Ocean County on November 13, 1961 (October 31, 1963, affid. of George Malinsky, pp. 2-3). On December 8, 1961, he was sentenced on each of six counts of forgery to concurrent terms of from two to four years and fined a total of twelve thousand dollars (*id.* p. 3). He never prosecuted an appeal from that judgment and had actually started serving his prison term when he was brought to New York City for one day, pursuant to an interstate detainer agreement, to receive the above-noted New York sentence (*id.* pp. 4, 9). Thus, his sentence in this state does not commence until after he has served his time in New Jersey (*id.* p. 10).

Early in 1964, the petitioner was paroled in New Jersey with the stipulation that he pay off his twelve thousand dollar fine at the rate of one hundred dollars a month. Curiously, there was attached the proviso that not only must petitioner remain within the confines of New Jersey during this probationary period—which amounts to ten years—but if New York be successful in extraditing him, his parole is thereby automatically revoked and, in that circumstance, he will be returned to his New Jersey prison. According to the petitioner's brief, the one hundred dollars

per month proviso has since been raised to thirty-five dollars a week (brief, p. 8).*

In November, 1963, the petitioner moved to set his New York sentence aside on the ground that he had been brought before the court improperly. It would therefore appear that what he is really claiming is that the New York judgment was entered by a court lacking jurisdiction. But since he is not in the custody of the New York authorities, it is patent that his application, at this stage, cannot be considered in the nature of habeas corpus. Post-judgment but pre-custody, his attack finds no vehicle as a statutory motion. By process of elimination, the petitioner's motion must be deemed an application for writ of *coram nobis*, since that is the only remedy which may now be available and it is by such designation that the Appellate Division granted leave to appeal as a poor person (order entered on November 12, 1964).

Specifically, petitioner's motion was directed at the use of the detainer compact between New York and New Jersey whereby New York obtained custody and imposed sentence. His lawyer argued that the agreement was not meant to be applied to post-conviction proceedings, and even if it was, the formalities of the interstate compact were not properly complied with. He concludes therefrom that sentence was improperly imposed and presumably hopes success will remove New York's warrant now outstanding against the petitioner in New Jersey.

* In reference to petitioner's discussion of New York's attempt to extradite him (brief, pp. 8-9), it should be noted that on September 14, 1965, the extradition proceedings were dismissed by the Hon. Jacob S. Glickenhaus of the Superior Court of New Jersey.

POINT I

Petitioner's writ was properly dismissed.

Mounting a technical attack against a sentence imposed upon him 16 months before, and which he has not yet begun to serve, the petitioner's legal structure is a creation lacking in foundation for of the only two bases available one is behind him and the other still ahead. Obviously, the petioner could have raised his objection to the means by which he was brought before the court at the time of sentence. The point, thus preserved, would then be reviewable by ordinary appeal from the judgment. This opportunity was lost. However, because of the peculiar character of the point, which is based on a claimed jurisdictional defect, a remedy may be accorded by state habeas corpus. But such action is still ahead of the petitioner who has not yet been reduced to state custody. At this moment, the petitioner's motion founders in a procedural abyss. Clearly, it has no recognizable shape as a statutory motion. And for various reasons, it fails to materialize as the friendly and powerful genie of *coram nobis*. Alas, rub though he may, Aladdin's lamp has limitations.

Basic to its power is that the wrong complained of must involve official fraud of constitutional dimension, which does not—and could not have—appeared on the record. In this case, no such fraud is claimed. Moreover, the petitioner's failure to complain at sentencing is the only reason his contention is not part of the record. Neglected remedies of the past, as well as future possible remedies, bar present resort to extraordinary avenues of relief. For, as fre-

quently noted, *coram nobis* is "an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available" *People* v. *Howard,* 12 N. Y. 2d 65, 66 (1962). See also *People* v. *Brown,* 13 N. Y. 2d 201 (1963).

Even if the hospitality of *coram nobis* be extended to the petitioner's claim, his application was fatally defective. The trial court's extraordinary power to review its own actions must be invoked by an affidavit of facts by the petitioner himself. The hearsay allegations of an attorney are no substitute for this minimum earnest of good faith. The omission of such direct allegations in this case deprived the court of the initial evidence upon which relief could be predicated.

Nor is this purely an exercise in the perpetuation of legal fictions, for in the instant case one of the contentions raised is lack of proper notice to the petitioner. A hearsay affidavit should not suffice to put this in issue.

While research has uncovered no law in this state expressly requiring the petitioner's sworn allegations to initiate reveiw by *coram nobis,* no application for the writ should be entertained without them.

It has been said that "*coram nobis* will issue only at the instance of a party to the record or of one in privity with him, or to a person injured by the judgment who will derive a benefit from its being recalled. 2 R. C. L. p. 309." *Jablonski* v. *People,* 330 Ill. 422, 71 N. E. 2d 361, 363 (1947). See also *State ex rel. Cutsinger* v. *Spencer* ("the proceeding is instituted by the judgment defendant") 219 Ind. 148,

41 N. E. 2d 601, 603 (1942). These few exceptions are based in necessity. No such justification can be attributed to the innovation petitioner's counsel introduces here, and no cause has been shown for such a dramatic expansion of present procedures.

Both uniform usage and reason sanction the simple procedural prerequisite of an affidavit from the petitioner. To begin with, the most untutored prisoners regularly observe the rule and apparently have no difficulty executing the necessary application. Nor is the requirement unfair, since the dismissal of an irregular petition is no bar to another on the same grounds.

Furthermore, although as a matter of policy indictments for perjured affidavits are rarely sought, prohibiting a petitioner from proceeding unless he commits himself to a sworn statement necessarily leaves him exposed to the potent antidote of criminal prosecution for materially false assertions. Finally, it is well-settled that certain actions are insufficient in law because instituted by someone not personally familiar with the facts. A motion for summary judgment is an obvious illustration. In a similar fashion, the application below was defective on its face. This inadequacy has not, to this day, been cured.

POINT II

The court which imposed judgment upon the petitioner had jurisdiction pursuant to §669-b of the New York Code of Criminal Procedure [answering petitioner's brief].

The Agreement on Detainers (§669-b New York Code Crim. Proc.) provides, *inter alia*, for the swift and orderly transfer of prisoners between states in order to dispose of "charges outstanding". It is petitioner's contention that because of an improper application of this statute, he was "illegally" and "unlawfully" brought into New York, and therefore improperly sentenced. In so urging he slides over the fatal defect in his argument. Even assuming he was improperly spirited from New Jersey to face sentence here, more than four score of years have passed since the United States Supreme Court affirmed that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court." *Ker* v. *Illinois*, 119 U. S. 436, 444 (1886). More recently, Mr. Justice Black, speaking for a unanimous bench in *Frisbie* v. *Collins*, 342 U. S. 519, 522 (1952), observed that "This Court has never departed from the rule announced in *Ker* v. *Illinois* [cit. om.], that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the Court's jurisdiction by reason of a 'forcible abduction'." Thus, even if petitioner's contention were soundly based, it is of no legal moment, for improper removal will not vitiate an otherwise valid sentence. Indeed, the fact patterns of *Ker* and *Frisbie* are much more extreme than the "kidnaping" in the present

case. Nor is it irrelevant that the petitioner was brought here as a recently convicted felon, and not merely as one accused of a crime.

Moreover, the petitioner takes a view of the compact so narrow as to conflict with its manifest purpose. He argues that the Agreement "does not authorize a transfer of a prisoner * * * for the sole purpose of sentencing" (brief, p. 10), pointing to section 669-b of the New York Code of Criminal Procedure which provides for the interstate transfer of prisoners where there is pending in any other party state "an untried indictment" [Article IV a]. However, this provision must be read in conjunction with the direction that "This agreement shall be liberally construed so as to effectuate its purposes" [Article IX]. The purpose of Section 669-b is clear. The opening sentence of the act notes, in part, that "The party states find that charges outstanding against a prisoner * * * produce uncertainties which obstruct programs of prisoner treatment and rehabilitation" [Article I]. It is patent that the uncertainty concerning an impending sentence in a sister state can as seriously injure "treatment and rehabilitation" as an open indictment.

The memorandum of the Joint Legislative Committee on Interstate Cooperation in support of Section 669-b observes that the Agreement on Detainers provides "a standardized and simpler method" than the then presently existing methods of transfer—such as extradition and private case by case agreements; moreover, the facilitation of "the speedy disposition of all untried charges" is stressed (McKinney's Session Laws of New York, 1957, p. 2102). This same Legislative Memorandum appends, as perti-

nent, comments in support of intrastate detainer legislation [Code Crim. Proc. 669-a]. There the same committee observed *inter alia* that "the correctional authorities are unable to plan a program or rehabilitation intelligently because neither they nor the prisoner can know whether detainers lodged against the prisoner may not ultimately be exercised with resultant additional conviction and sentence" (*id.* p. 2093).

It seems apparent that the legislature did not consider the possibility of a sentence being divorced temporally from the trial itself. However, the committee's expressed concern over the effect that a pending sentence proceeding might have upon rehabilitative treatment during incarceration elsewhere leads logically to the conclusion that it is sound practice to apply the Detainer Agreement to that stage of the proceeding. Such application is certainly compatible with present penological thinking which provides that rehabilitative treatment is more effectively absorbed when the prisoner is not left to guess as to just what other punishment he might be facing.

With this in mind, the "liberal" construction directed should be adopted and "untried" indictments interpreted as "undisposed of". This "effectuate[s] its [the act's] purposes".

Petitioner's final argument is that even if the Detainer Agreement is applicable, it was unlawfully executed because he was not notified in a proper fashion, and that this failure amounted to a denial of due process (brief, p. 13). His argument is based on a prisoner's right to oppose transfer by instituting a motion to the "sending" governor.

He concludes that if he has a right to move, he necessarily has a right to know (brief, p. 13). He concedes, however, that New Jersey, unlike New York, did not require specific advisement of his right to go to the executive (brief, p. 13).

But his theory overlooks the fact that on April 28, 1962, petitioner was notified "that a Detainer (Bench Warrant) had been lodged against him by New York" (Affid. of George J. Malinsky, October 31, 1963, p. 7, ¶17) and that the petitioner thereon refused to consent to transfer (*id.* pp. 7-8, ¶19). Certainly this is notification. What petitioner is apparently complaining of is that nobody detailed for him the legal steps he should follow to delay or avoid being sent to New York. But, surely, this is not the state's obligation.

Moreover, his entire argument assumes a hypothetical aura when it is realized that to this day he has never pretended to have a contention of such validity that it would have prevented his transfer. And finally, it should not be forgotten that while the petitioner had the expressed statutory right "to contest the legality of his transfer", when he appeared at sentence in this state—represented by eminent counsel—he failed to do so. He cannot be heard to complain at this late date.

His complaint that counsel was not available to him at the New Jersey hearing preceding his transfer is without legal significance. That proceeding was merely a preliminary to the sentence; whatever aggrievance he may have felt could have been pressed by counsel at the sentence itself, which occurred the following day. None was forthcoming.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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